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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 917

ESTATE OF WILLIAM T. MAYER,
PHILIP A. PAGANO, Executor,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD S. BENTLEY,
Counsel for Petitioner,
20 Exchange Place,
New York, N. Y. 10005.

RICHARD KILCULLEN,
of Counsel,
233 Broadway,
New York, N. Y. 10007.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on October 20, 1965.

Opinions Below

The opinion of the Tax Court of the United States is reported at 40 T. C. 403. The opinion of the Court of Appeals for the Second Circuit is reported at 351 F. 2d 617.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered on October 20, 1965 and a copy thereof is appended to this petition in the Appendix at pages 10-11. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented

On qualifying as executor of the estate of William T. Mayer, deceased, the petitioner retained and relied on qualified counsel to aid in the administration of the estate, including the preparation and timely filing of all State and Federal estate tax returns. Petitioner failed to timely file the Federal estate tax return because of an error on the part of his attorney in noting the date the return was due. The Commissioner imposed a 10% penalty under Section 6651(a) of the Internal Revenue Code of 1954 for late filing of the return. The Tax Court upheld the Commissioner's determination and the Court of Appeals affirmed the Tax Court's decision. The question presented is:

Whether, as a matter of law, there is reasonable cause within the meaning of Section 6651(a) of the Internal Revenue Code of 1954 for the petitioner's failure to file the estate tax return when due when he has retained and relied on qualified counsel for the preparation and timely filing of such a return and has turned over to such counsel all material necessary for the preparation of the return.

Statutes and Regulations Involved

The statute involved is Section 6651(a) of the Internal Revenue Code of 1954. Section 6651(a) reads as follows:

> "Addition to the tax.—In case of failure to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), of subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with re-

gard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than one month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25% in the aggregate."

The Treasury regulation involved is Section 301.6651-1. Failure to File Tax Return. The pertinent provisions of this regulation are as follows:

"(a) *Addition to the tax*—(1) *In general.* In case of failure to file a return required under authority of—

(i) Subchapter A, chapter 61, of the Code, relating to returns and records (other than sections 6015 and 6016, relating to declarations of estimated tax, and part III thereof, relating to information returns);

* * * * * *

and the regulations thereunder, on or before the date prescribed for filing (determined with regard to any extension of time for such filing), there shall be added to the tax required to be shown on the return the amount specified below unless the failure to file the return within the prescribed time is shown to the satisfaction of the district director or the director of the regional service center to be due to reasonable cause and not to willful neglect. (See subparagraph (3) of this paragraph.) The amount to be added to the tax is 5 percent thereof if the failure is for not more than one month, with an additional 5 percent for each additional month or fraction thereof during which the failure continues, but not to exceed 25 percent in the aggregate.

* * * * * *

(3) *Showing of reasonable cause.* A taxpayer who wishes to avoid the addition to the tax for failure to file a tax return must make an affirmative showing of all facts alleged as a reasonable cause for his failure to file such return on time in the form of a written statement containing a declaration that it is made under penalties of perjury. Such statement should be filed with the district director with whom the return is required to be filed. If the district director determines that the delinquency was due to a reasonable cause, and not to willful neglect, the addition to the tax will not be assessed. If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause."

Statement

This proceeding involves a deficiency in estate taxes in the amount of $3,466.89 caused by the Commissioner's determination of a 10% penalty under the provisions of Section 6651(a) of the Internal Revenue Code of 1954 for late filing of the estate tax return. The basic facts, which are not in dispute, are as follows:

William T. Mayer died on October 9, 1958, and Philip A. Pagano was appointed executor of his estate (R. 13a, 14a). Mr. Pagano is the petitioner in this action.

The petitioner is a certified public accountant with limited experience in the field of New York and Federal estate tax matters. Most of his clients are small retail businesses such as liquor stores (R. 14a).

Promptly upon qualifying as executor of the estate, the petitioner retained the services of William J. Schmitt as counsel for the estate. At the time he was retained by the petitioner Mr. Schmitt had been a practicing attorney

in New York City for over 30 years and during that period had considerable experience in the fields of both income and estate taxation. During the preceding 20 years he had prepared and filed at least eight Federal estate tax returns (R. 15a). The Tax Court specifically found as facts that the petitioner considered Mr. Schmitt to be qualified in estate tax matters and that he relied on Mr. Schmitt "to prepare for his signature the necessary tax returns for the estate, in proper form, and to timely file such returns." (R. 28a) All information necessary for the preparation of the Federal estate tax return was turned over to Mr. Schmitt by the petitioner (R. 18a, 28a).

The Federal estate tax return was due on January 9, 1960, but was not filed until March 7, 1960 (R. 13a). The reason for the failure to file the return on time, or for failing to request an extension of time to file, was that Mr. Schmitt had made a mistake in noting the date the return was due in his diary. Because of a miscalculation, he entered in his diary the date of March 9, 1960 instead of January 9, 1960 as the date the return was due (R. 28a).

After the Federal return was filed, the Commissioner imposed a penalty of 10% of the amount shown as due on the return as filed by the petitioner. This amount has been assessed and is not in contest here. Upon audit the petitioner agreed to a deficiency in tax of $34,668.91, and on this amount the Commissioner imposed an additional penalty of $3,466.89. A notice of deficiency with respect to this additional penalty was issued on December 11, 1962, and on March 4, 1963, the petitioner filed with the Tax Court a petition for redetermination. It is this additional penalty which is the subject of dispute in this case (R. 13a, 14a).

The Tax Court upheld the Commissioner's determination on the ground that reasonable cause for late filing of the tax return within the meaning of Section 6651(a)

of the Internal Revenue Code, was not shown by the facts of the case (R. 32a).

The Court of Appeals for the Second Circuit affirmed the Tax Court's decision stating that "The Tax Court's conclusions from the facts as stipulated should not be disturbed unless clearly erroneous. Reasonable cause can be determined only from the particular situation presented in each specific case." (R. 38a)

Reasons for Granting the Writ

The decision of the court below should be reviewed because it is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *Fisk* v. *Commissioner,* 203 F. 2d 258 (1953), 43 AFTR 687. The decision to be reviewed deals with an important factor in the administration of the Internal Revenue Code in that it involves the question whether, when a taxpayer relies on a qualified expert to prepare and timely file tax returns and turns over to such expert all material necessary for the preparation of the returns, he is nevertheless to be held responsible for any errors his consultant may make which cause the return to be filed late, or whether reliance on such expert is *per se* to be considered as meeting the standard of care required from a taxpayers.

1. The Court of Appeals for the Sixth Circuit in *Fisk* v. *Commissioner, supra,* held that retention of, and reliance upon, an attorney or an accountant for the preparation and filing of tax returns in itself constituted reasonable cause as a matter of law for the late filing of the tax return. Reasonable cause was defined by the Court to mean "nothing more than the exercise of ordinary business care and prudence." The Court stated that "the existence of reasonable cause is in the first instance one of fact for the Tax Court, . . . , which must decide whether the elements which constitute reasonable cause are present in a case. What elements must be presented to constitute reasonable cause is a question of law." The Court held that once the

Tax Court finds as facts that the taxpayer had retained a qualified expert, had turned over to that expert all material necessary to prepare the tax return, and had relied on the expert to prepare and timely file the tax return, then, as a matter of law, the taxpayer has met the standard of reasonable cause set forth in Section 6651(a) of the Internal Revenue Code.

The decision of the court below is in direct conflict with the decision of the Sixth Circuit in *Fisk*. Even though the Tax Court specifically found as facts the very elements stated by the Sixth Circuit as requiring a finding of reasonable cause as a matter of law—*i.e.*, the retention of, and reliance upon, a qualified attorney to prepare and timely file the estate tax return—the court below nevertheless affirmed the Tax Court decision holding that the failure to file the return on time was not, in this particular case, due to reasonable cause. In its opinion the court below stated: "Reasonable cause can be determined only from the particular situation presented in each specific case." (R. 38a)

This Court has granted certiorari on several different occasions to review the decision of a Court of Appeals in tax matters when that decision was in conflict with the decision of another circuit. *Millinery Center Building Corp.* v. *Commissioner,* 350 U. S. 456 (1956); *Flora* v. *United States,* 357 U. S. 63 (1958); *United States* v. *Zacks,* 375 U. S. 59 (1963). The question involved in this case is one that has given considerable difficulty to the courts of appeals and to the Tax Court for a number of years. The following cases have held that retention of, and reliance upon, qualified experts to prepare and timely file tax returns constituted reasonable cause for late filing as a matter of law. *Estate of Corra Baer,* decided November 7, 1957 (P-H Memo T. C. par. 57,211); *C. R. Lindback Foundation,* 4 T. C. 652, 667 (1945), aff'd 150 F. 2d 986 (3rd Cir. 1945), 34 AFTR 125; *Agricultural Securities Corporation,* 39 B. T. A. 1103 (1939); and see *Haywood Lumber*

and Mining Co. v. *Commissioner,* 178 F. 2d 769 (2d Cir. 1950), 38 AFTR 1223. The following cases apparently hold that the retention of, and reliance upon, expert advice may not, by itself, be sufficient to constitute reasonable cause. *Ferrando* v. *United States,* 245 F. 2d 582 (9th Cir. 1957), 51 AFTR 597; *Estate of Stanley T. Sochalski,* decided January 28, 1955 (P-H Memo T. C., par. 55,019); *Estate of Curie,* 4 T. C. 1175; *Stout* v. *Commissioner,* decided January 30, 1959 (P-H Memo T. C., par. 59,016). A decision by this Court in this case will settle the conflict that exists between the Second and Sixth Circuits and will help guide the decisions of the lower courts when confronted with similar problems in the future.

2. The question presented in this case is an important one since it involves the efficient administration of the Internal Revenue Code. The complexity of the many provisions in the Code often makes it desirable if not necessary for the taxpayer to obtain expert advice with respect to the preparation and filing of tax returns. By encouraging taxpayers to seek the help of experts who are familiar with the provisions of the Internal Revenue Code and the rules and regulations issued thereunder, not only is the taxpayer aided with his problems, but the entire administration of the Internal Revenue Code is simplified.

In an earlier decision, one that seems inconsistent with the present holding, the court below stated:

> ". . . The standard of care imposed by Section 291 [of the 1939 Code] is personal to the taxpayer. To impute to the taxpayer the mistakes of his consultant would be to penalize him for consulting an expert; for if he must take the benefit of his counsel's and accountant's advice *cum onere,* then he must be held to a standard of care which is not his own and one which, in most cases, would be higher than that expected of a layman." *Haywood Lumber & Mining Co.* v. *Commissioner, supra.*

The interpretation placed on Section 6651(a) by the Tax Court and the court below, which allowed a penalty to be imposed for late filing even though the Tax Court found as facts that the taxpayer retained, and relied upon, qualified counsel for the preparation and timely filing of the estate tax return, can only result in continued confusion as to the extent a taxpayer is justified in relying on expert advice. If the decision of the court below is to be followed, the taxpayer who retains an expert advisor must still constantly look over his advisor's shoulder and check on the work that is being done. This would deny most, if not all, of the beneficial effect gained from retaining an expert and would make the expert's task more difficult if not impossible to perform.

A proper interpretation of reasonable cause as used in Section 6651(a) of the Internal Revenue Code, and the interpretation reached by the Court of Appeals for the Sixth Circuit, is that a taxpayer has exercised ordinary business care and prudence when he retains a qualified expert, relies on that expert to prepare and timely file the necessary tax returns, and turns over to that expert all the material necessary for the preparation of tax returns. If, for any reason, the expert fails to have the return prepared for the taxpayer's signature when due, as far as the taxpayer is concerned there was reasonable cause for late filing. Such a result seems called for by the statement of this Court in *Spies* v. *United States,* 317 U. S. 492 (1942), that "It is not the purpose of the law to penalize . . . innocent errors made despite the exercise of reasonable care".

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

EDWARD S. BENTLEY,
Counsel for Petitioner.

RICHARD KILCULLEN,
Of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 29—September Term, 1965.

(Argued September 21, 1965 Decided October 20, 1965.)

Docket No. 29682

ESTATE OF WILLIAM T. MAYER,
PHILIP A. PAGANO, Executor,
Petitioner-Appellant,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Before:

MOORE, SMITH and ANDERSON,
Circuit Judges.

Petition to review a decision of the Tax Court, 43 T. C. No. 34, upholding a deficiency of $3,466.89 in estate taxes resulting from the imposition of a 10% penalty for failure to file an estate tax return on or before the due date thereof (Int. Rev. Code of 1954 §6651(a)).

Affirmed.

RICHARD KILCULLEN (McGuigan & Kilcullen, New York, N. Y.), *for Petitioner-Appellant.*

HOWARD J. FELDMAN, Department of Justice (Louis F. Oberdorfer, Assistant Attorney General, Lee A. Jackson and Meyer Rothwacks, Department of Justice, Washington, D. C., on the brief), *for Respondent-Appellee.*

Appendix

PER CURIAM:

Fifteen months after the death of William T. Mayer on October 9, 1958, the estate tax return was due to be filed, namely, by January 9, 1960. The return was filed on March 7, 1960. A 10% penalty (5% for two months) was imposed because of the late filing (Section 6651(a), Internal Revenue Code of 1954). The burden is on the petitioner to show that "failure is due to reasonable cause and not due to willful neglect." The Tax Court's conclusions from the facts as stipulated should not be disturbed unless clearly erroneous. Reasonable cause can be determined only from the particular situation presented in each specific case. Other decisions *pro* and *contra* are of little help.

The executor is a certified public accountant familiar with Federal and State income taxes insofar as they relate to his clients. To assist him in his duties as executor he retained an attorney with experience in the preparation of Federal estate tax returns. The executor filed an "Estate Tax Preliminary Notice" in which in boldface type he was advised that failure to file within 15 months might subject him to penalties. Problems of estate property valuation caused the executor and his attorney to seek accelerated action from New York State in order to be able to insert such values in a timely Federal return. Agreement with New York State was not reached until March 1, 1960.

The Tax Court correctly found that "This is not a situation where an executor who is not well versed in tax law and in business matters relies completely on a tax expert to handle such matters * * *" and concluded that "considering petitioner's general familiarity with tax law and the fact that the due date of the return was clearly called to his attention * * *," "petitioner failed to exercise the ordinary business care and prudence that could reasonably be expected of him." The decisions cited and relied upon by petitioner do not require a contrary result.

The decision of the Tax Court is affirmed.